Counsel for the Pursuers (Reclaimers)—Sol.-Gen. Hunter, K.C.—Hamilton. Agents—Sharpe & Young, W.S.

Counsel for the Defender (Respondent)—Wilton—Chapel. Agents—Mackay & Young, W.S.

Tuesday, March 7.

SECOND DIVISION.

(BEFORE SEVEN JUDGES.)

[Sheriff Court at Edinburgh.

BLACK *v.* HUMPHREY.

Bankruptcy—Notour Bankruptcy—Statute—Constitution of Notour Bankruptcy where Imprisonment for Debt Incompetent—Expiry of Charge without Payment—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 6.

Held by a majority of Seven Judges (*diss.* the Lord Justice-Clerk, Lords Ardwall and Salvesen) that the mode of constituting notour bankruptcy provided by section 6 of the Debtors (Scotland) Act 1880 applied to all cases in which imprisonment was incompetent under that Act, even although prior to the Act such cases were exempt from imprisonment, and applied therefore to an individual against whom a decree for a debt not exceeding £8, 6s. 8d. had been obtained.

Paull v. *Smith*, 1910 S.C. 1025, 47 S.L.R. 878, *followed* and *approved.*

Stewart's Trustee v. *Salvesen & Company*, June 12, 1900, 2 F. 983, 37 S.L.R. 772, *distinguished.*

Black v. *Watson*, November 29, 1881, 9 R. 167, 19 S.L.R. 141, *commented on.*

The Small Debt (Scotland) Act 1835 (5 and 6 Will. IV, cap. 70) [since repealed by the Statute Law Revision Act 1891 (54 and 55 Vict. cap. 67)] provided by section 1 that it should not be lawful to imprison any person on account of any civil debt which did not exceed the sum of £8, 6s. 8d. exclusive of interest and expenses thereon.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) enacts—Section 7—"Notour bankruptcy shall be constituted by the following circumstances—(Second) By insolvency, concurring either (*a*) with a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment, . . . or where imprisonment is incompetent or impossible, by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security. . . ."

The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34) enacts—Section 4—"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt. . . ." Section 6—"In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made. Nothing in this section contained shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856."

Robert Black, butcher, Edinburgh, a creditor of Miss Barbara Sutherland Humphrey, presented in the Sheriff Court at Edinburgh a petition for cessio of her estates.

The petition stated that the defender "is unable to pay her debts, and is notour bankrupt within the meaning of the Debtors (Scotland) Act 1880. Pursuer produces herewith (1) extract decree of the Sheriff (Small Debt) Court, Edinburgh, in the action at his instance against the defender for payment of the sum of five pounds and twopence with nine shillings and tenpence of expenses, and execution of charge thereon, dated the 31st day of March 1910, which charge has now expired without payment of the debt having been made; and (2) report of poinding, also following upon said extract decree and expired charge executed upon and dated the 12th day of April 1910.

The goods poinded by pursuer were a travelling trunk, valued by the sworn appraisers at 1s., two pieces of old carpets valued at 6d., twelve biscuit tins valued at 1s., and an old lawn mower valued at 6d. Defender averred that the said goods either did not belong to her or were of no value and derelict.

Defender pleaded, *inter alia*—"(2) The pursuer having failed to poind any goods belonging to the defender, the latter has not been rendered notour bankrupt. (3) *Separatim.*—The articles in the schedule founded on being of no value, the poinding is illusory and inept, and the defender has therefore not been rendered notour bankrupt."

On 15th July 1910 the Sheriff-Substitute (GUY) repelled the defences.

Note.—". . . The other question is whether notour bankruptcy has been constituted. If an expired charge without payment is sufficient in itself to constitute notour bankruptcy, it would appear to be beyond dispute that notour bankruptcy has been constituted. The charge was given on 31st March 1910, and it is not disputed that it expired without payment. I read the case of *Harvie* v. *Smith*, 1908 S.C. 474, as deciding that an expired charge is in itself sufficient and as overruling the decision in *Black* v. *Watson*, 1881, 9 R. 167. I accordingly think it is irrelevant to inquire whether a poinding took place at all, or whether the articles poinded belonged to the defender. . . ."

The defender appealed to the Court of Session, and on 4th November 1910 the Judges of the Second Division appointed

the case to be argued before a Court of Seven Judges.

Argued for the appellant—The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 6, only applied to cases where imprisonment was rendered incompetent for the first time. If it had been intended to apply to all cases of civil debt, it would have been easy to express that intention by suitable words, and at the same time to repeal section 7 of the Bankruptcy (Scotland) Act 1886 (19 and 20 Vict. cap. 79) as to the constitution of notour bankruptcy. It was quite conceivable that the Legislature intended to maintain the difference between the methods of constituting notour bankruptcy in the case of small sums and in the case of large sums. There were four cases in which this same question had been raised. In *Black* v. *Watson*, November 29, 1881, 9 R. 167, 19 S.L.R. 141, Lord President Inglis and Lord Muir had expressed the opinion that the two sections were to be read separately and that the section of the earlier Act still remained in force. These remarks were not *obiter* and had not been treated as *obiter* till quite recently. In the next case—that of *Stewart's Trustee* v. *Salvesen & Company*, June 12, 1900, 2 F. 983, 37 S.L.R. 772—the same principle had been affirmed by the Second Division, in that instance in the case of a company. In *Harvie* v. *Smith*, 1908 S.C. 474, 45 S.L.R. 387, for the first time a different view was expressed, but it was not necessary in that case to decide that sums of less than £8, 6s. 8d. fell within the Debtors (Scotland) Act 1880, and the case did not so decide, and, further, the previous case of *Stewart's Trustee* v. *Salvesen & Company, cit. sup.*, was not cited to the Court in the discussion. The latter case was, however, considered in *Paull* v. *Smith*, 1910 S.C. 1025, 47 S.L.R. 878. If the appellant was right in this argument, then it was necessary for respondent to poind, and he had not stated a relevant case on this point, and even if relevant appellant was entitled to a proof that the articles poinded did not belong to her.

Argued for respondent—The Debtors (Scotland) Act 1880 was absolutely comprehensive in its terms, and applied to all cases where imprisonment was incompetent. It was a complete code and charter of immunity to everyone. The Act of 1880 really repealed the Act of 1835, and the provisions of the earlier Act were incorporated in the later. This argument gained strength from the title of the Act, which was an "Act to abolish imprisonment for debt" and not to extend exemptions. It was, however, necessary to preserve the provisions as to notour bankruptcy in the Bankruptcy (Scotland) Act 1856 in certain cases of a company. The words "rendered incompetent" in the Debtors (Scotland) Act 1880 meant "declared" and did not imply "for the first time." Where the language of the statute was clear, it was incompetent for the Court to construe it by reference to the historical reasons for which the statute was passed—*Lord Advocate* v. *Caledonian Railway Company*, 1908 S.C. 566, *per* Lord President at p. 574, 45 S.L.R. 437. A statute might be repealed by implication, and the Small Debt (Scotland) Act 1835 (5 and 6 Will. IV, cap. 70) had been so repealed—Maxwell on the Interpretation of Statutes, 4th ed., 236 and 264—*Garnett* v. *Bradley*, 1878, 3 A.C. 944. But further, there was express repeal of the whole Act by the Statute Law Revision Act 1891 (54 and 55 Vict. cap. 67), because it had become obsolete or been superseded—*Cairney* v. *Wright*, 1909 S.C. 894, 46 S.L.R. 223. If, however, the contention of the appellant was right, the result of the repeal was simply to leave a gap. As to the cases cited by appellant—*Black* v. *Watson*, *cit. sup.*, did not raise the point now before the Court and had nothing to do with privileged debtors; *Stewart* v. *Salvesen & Company*, *cit. sup.*, dealt with notour bankruptcy of a company, and any observations against respondent made in the case were *obiter*; *Harvie* v. *Smith*, *cit. sup.*, was in respondent's favour. In *Paull* v. *Smith*, *cit. sup.*, Lord Johnston proceeded entirely on the case of *Stewart* v. *Salvesen & Company*, *cit. sup.* The present was not a case where the maxim *stare decisis* applied—*Dean* v. *Brown*, 1909, 2 K.B. 573, *per* Fletcher Moulton, L.J. The affirmation of respondent's contention would involve no interference with practice or with existing contracts. Reference was also made to *Craig* v. *Macdonald*, July 25, 1905 (O.H.), 13 S.L.T. 411, and to the Interpretation Act 1889 (52 and 53 Vict. cap. 63).

At advising—

LORD KINNEAR—The question which has been argued before us, and which I understand to be the only point remitted to this Court for consideration, is whether the appellant, who has been charged upon a decree of the Small Debt Court, falls within the provisions for the constitution of notour bankruptcy of the Debtors (Scotland) Act 1880, inasmuch as those provisions are said to apply only to cases in which imprisonment is made incompetent by that Act, and not to cases in which it was already incompetent by the previous law. And by the previous law imprisonment was not competent for the enforcing of a debt of the amount of the debt in this case, or for any amount below £8, 6s. 8d. This was precisely the question decided by the First Division in the cases of *Harvie* v. *Smith* (1908 S.C. 474) and *Paull* v. *Smith* (1910 S.C. 1025), but I understand that the present case has been sent to a court of Seven Judges for the express purpose of reconsidering those two decisions. I was a party to both of those decisions, but I need hardly say that I do not hold myself bound by anything said by myself or any of the Judges with whom I concurred. I desire to consider the point as if it were an entirely new point, and I do not consider myself committed to any particular view. I am in a better position to consider the question now, because we have heard further argument, and because I have had

the great advantage of knowing more fully than could be known to the First Division the grounds upon which those of your Lordships who dissent from the views expressed by the First Division base your opinions. But giving all due weight to all the considerations brought before us, and endeavouring to look at the question with an open mind, I have arrived at the same conclusion as I reached with my brethren of the First Division.

The question arises in this way. The Act of 1880 in section 4 abolishes imprisonment for debt, and then in section 6 provides as follows—"In any case in which under the provisions of this Act imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment. . . ." Now it is said that that provision applies only to cases in which imprisonment is rendered incompetent by the provisions of this Act; so far I entirely concur; I think it applies only to cases in which imprisonment is incompetent under the Act. But then it is said that the provision does not apply to cases in which imprisonment was incompetent before the passing of the Act, because those cannot be said to be cases in which imprisonment is *rendered* incompetent by the Act. I think a great part of the argument rested upon the force which it is said must be ascribed to the word "rendered." I must say that I think it is a wrong way of construing an Act of Parliament, or any other written instrument, to begin by taking a particular word out of a sentence and fixing its meaning without regard to the context. The proper way is to take the sentence as a whole and construe all the words with reference to each other. The word "render" is a word of ordinary language, and it is used with no more unvarying precision than other ordinary words by ordinary people. I do not dispute that it is apt to express the meaning ascribed to it, if that is the clear intention of the sentence. It is perfectly good English to say that imprisonment, having formerly been incompetent only in certain cases, is now by this Act of Parliament rendered incompetent in other cases; but it is just as good English to say that having formerly been incompetent only in certain cases imprisonment is now by this Act rendered incompetent in *all* cases. We must go to the context to see what is meant by the word in the particular clause in which it is used. Now the opening words of the section send us back to the provisions of the Act, and nothing but the provisions of the Act will show what is rendered incompetent. Section 4 says this—". . . No person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt," and there follow two special cases which are to be excepted—taxes and rates, and sums decerned for aliment. That appears to me to raise one question, and one question only, viz., Is this a case of a person within the general rule, and if so, is it a case within either of the exceptions?

The enactment is universal and applies to everybody, even though at the time when the Act was passed certain persons were already exempt from imprisonment. Those were privileged cases resting either upon common law or upon special enactment applying to a limited class of debtors. The Act of 1880 does not expressly repeal those enactments, but it supersedes them by providing a general rule which exempts all the lieges from liability to imprisonment for civil debt. This would be clear enough if the question were raised directly by an attempt to imprison anyone for a civil debt. I apprehend a debtor would be very ill-advised to come into Court and plead that the creditor who was attempting to imprison him had infringed some special privilege of exemption which he possessed. He would rather take his stand upon the general right, common to all the lieges, under the provisions of this Act, and that would be the only ground upon which his plea would be heard. It would be extravagant to suppose that the creditor could answer, his debtor belonged to a class who were privileged before the Act was passed and was therefore outside the Act, so that he must show that in the particular circumstances he was entitled to the benefit of the special privilege. It would be idle to inquire whether any particular privilege was applicable or not, because all His Majesty's subjects are now exempt from imprisonment for civil debt. What the Act really did, in my opinion, was to substitute for those special privileges a common right upon which all the lieges can rely. And therefore the one and only question in every case is whether the debt falls within the general rule or within the exceptions.

To my mind that argument would be conclusive were it not for the authority, which is entitled to very great weight, of the cases of *Stewart's Trustee* v. *Salvesen & Company* (2 F. 983) here, and *Black* v. *Watson* (9 R. 167) in the First Division. As to the case of *Stewart's Trustee*, if I may say so, I think that case was perfectly rightly decided, because the question there was how a company could be made notour bankrupt, and it was held that a company was not within the provisions of this Act by which imprisonment is rendered incompetent. I agree; a company is exempt from imprisonment, but not because of any special exemption in the Debtors Act or any other statute, but simply on account of its incapacity to suffer imprisonment. A company is not a natural person, and you cannot imprison a legal conception. The way in which a company can be made notour bankrupt is described in the Bankruptcy (Scotland) Act 1856, where it is enacted in section 8 that notour bankruptcy of a company shall be constituted in any of the ways specified in section 7, or by any of the partners being rendered notour bankrupt for a company debt, and amongst the provisions of section 7 there is this—

"where imprisonment is incompetent or impossible," notour bankruptcy is to be constituted by the execution of certain diligences. We must assume that the statute uses language with a reasonable degree of accuracy, and incompetency is one thing and impossibility another and a different thing. This is the only enactment which provides for the case of imprisonment being impossible; and it is clearly applicable to the case of a legal person which cannot be imprisoned. But although that was the whole decision, a difficulty does arise, not from the decision itself, but from the dicta of the learned Judges, who undoubtedly do express opinions that the Act of 1880 has no application to cases in which imprisonment was incompetent under the previous law. I attach great weight to those dicta, more especially because they are in accord with what Lord President Inglis said in the case of *Black* v. *Watson* (*cit.*). That is what has created the greatest difficulty in my mind, for it would be impossible to regard judicial authority with greater respect than that with which I regard the authority of Lord President Inglis. But what his Lordship said in *Black* v. *Watson* was not essential to the decision of the case, and therefore does not absolve us from the necessity of forming our own opinions as to the true construction of the statute. With all respect, therefore, I must adhere to my own opinion because it is my own, and I may add that I think the argument upon which the learned Lord President proceeded is not one which would have commended itself to him if he had been obliged, as we have been, to consider the clauses of the two statutes in relation to one another. For the main ground on which the Lord President based his opinion was the necessity for reconciling the special provision about notour bankruptcy in the Act of 1880 with the qualification attached to it—"Nothing in this section contained shall affect the provisions of section seven of the Bankruptcy (Scotland) Act 1856." And his Lordship said that the construction he proposed to put upon section 6 of the Act of 1880 would not affect the provisions of the earlier Act.

Now in the view which I recommend to your Lordships there is nothing to affect the provisions of section 7 of the Act of 1856 any more than there was in the view which the Court took in *Black* v. *Watson*. The Act of 1880 begins by abolishing imprisonment for debt, and then enacts that notour bankruptcy shall be constituted in a certain way. It introduces a new process for the constitution of notour bankruptcy, but says that this is not to affect the Act of 1856, which provides another process for the same object. The two Acts are to stand together, and I can see no difficulty in reading them together. The only stateable difficulty is that the Act of 1880 provides for notour bankruptcy being constituted in a case to which the Act of 1856 also applies, and the Act of 1856 requires further procedure than is necessary under the later Act. Those two provisions stand side by side, and if there were nothing more I should say that there was overlapping and nothing else. But we are not left to the comparison of the two sections, for the Act of 1880 goes on to provide for the practical operation of the new system which it introduces by allowing to the debtor a petition for *cessio bonorum*. This provision begins with the following words—"Any debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856, or of this Act"; that is to say, the debtor is always offered the alternative of taking proceedings under the Act of 1856 or under the Act of 1880. The statute requires that the two sets of provisions are to be read together, and that notour bankruptcy is to be constituted if either the one or the other is applicable. This imports the whole code with regard to notour bankruptcy of the Act of 1856. The natural consequence of that is that the sections of the two Acts overlap. There may be in this some logical awkwardness and inelegance, but there is no practical difficulty, because the statute says that one set of provisions or the other is to be used, and that creates no difficulty of construction.

There remains one other point, and it is this. It is said that to allow notour bankruptcy to be constituted by an expired charge for payment of a small debt would be an extremely harsh proceeding and might operate prejudicially in the case of an honest debtor who is willing to pay. In the first place, the point so stated is put much too high, for notour bankruptcy is not in the Act constituted merely by an expired charge. It needs insolvency concurring therewith, and the two requisites are equally necessary. Even so, I can understand that a question of expediency might arise as to whether this is not a very summary way of constituting notour bankruptcy, but that is a matter for the Legislature and not for us. It is out of the question that we should interpret a statute by reference to what we might think expedient. And even if we were to consider the question of expediency, I confess I am quite unable to appreciate the argument that Parliament intended to draw a distinction as to the way in which notour bankruptcy is to be constituted according as the debt is or is not above a certain amount. It is suggested that the method of constituting notour bankruptcy provided by the Act of 1880 does not apply to a debt below £8, 6s. 8d. There is no doubt that it does apply to a debt of £8, 7s., with regard to which imprisonment was competent prior to 1880. Why should it be thought that Parliament intended the Act to apply to one small debt and not to another which is only a little smaller? The question of expediency is settled by the statute itself. It must be kept in view that the main purpose of the Act of 1880, after providing for the general abolition of imprisonment, is to set up a new procedure for the distribution of small estates. For that purpose it introduces a novel process allowing a creditor to apply for cessio, which had

hitherto been a privilege only of the debtor himself. The whole purpose of the provisions was to provide for the distribution of small estates by creditors whose debts were below the statutory amount necessary to enable them to sequestrate the debtor. That the estates must be insolvent estates I have no doubt. When the question is whether Parliament thought a provision of this kind should apply to a small estate, when it is conceded that it does apply to a larger one, the answer is that that is exactly what Parliament has done, and we cannot assume that the interests of small debtors and creditors were not thought worthy of the attention of the Legislature.

On the whole matter I am of opinion that we should affirm the interlocutor of the Sheriff-Substitute.

LORD ARDWALL—I am of opinion that in this case notour bankruptcy was not constituted merely by the expiry of the days of charge. For the grounds of my judgment I refer to the opinion of Lord Salvesen, which I have had an opportunity of reading, and in which I entirely concur.

LORD DUNDAS—I have found this question a difficult one to decide, looking to the language of the Debtors Act of 1880, and to the conflicting judicial opinions which have been expressed as to its proper construction. But I have come to a conclusion in accordance with the views stated by the Lord President (Dunedin) in *Paull* v. *Smith* (1910 S.C. 1025), and desire to adopt these views as my own, subject to the verbal correction (which I have his Lordship's authority for making) that the word "opinion," occurring on p. 1027, line 7, should obviously be "decision." I further agree with the opinion now delivered by my brother Lord Kinnear. The Sheriff-Substitute's interlocutor should, in my judgment, be affirmed.

LORD JOHNSTON—In *Craig* v. *Macdonald* (13 S.L.T. 411) I committed myself in the Bill Chamber to a view on this question which was in accordance with that of the Second Division in the case of *Stewart's Trustee* v. *Salvesen & Company* (1900, 2 F. 983), of which, however, at the time I had no knowledge. I followed, as I thought I was bound to do, the authority of the First Division in *Black* v. *Watson* (1881, 9 R. 167). But I had no proper discussion, and no other authorities were cited.

When the question was again raised in *Paull* v. *Smith* in July last (1910 S.C. 1025) I had an opportunity of more maturely considering the question, and, differing from the rest of the Court, I adhered to the opinion at which I had formerly arrived.

I have now had an opportunity of again reconsidering the question, after an exhaustive and able argument, and have to admit my conversion to the views of my brethren of the First Division. The balance of judicial authority is very narrow, for I cannot regard the opinions delivered in the cases of *Black* v. *Watson* (*supra*) and *Stewart's Trustee* v. *Salvesen & Company* (*supra*) as mere *obiter dicta*, although they were probably formed without the full consideration which the question has now received. But the result is that on the ratio of the opinions of six Judges—Lord President Inglis, Lord Mure, Lord Shand, the present Lord-Justice Clerk, Lord Trayner, and Lord Moncreiff—notour bankruptcy cannot be held to exist in the present case, as the debt in respect of which it is said to have been constituted is less than £100 Scots, because imprisonment on account of a debt of such amount was not rendered incompetent by the Debtors Act 1880, but had already been rendered incompetent by the Act of 1835. While if the ratio of the opinions of four Judges—the present Lord President, Lord M'Laren, Lord Kinnear, and Lord Salvesen—in the cases of *Harvie* v. *Smith* (1908 S.C. 474) and *Paull* v. *Smith* (1910 S.C. 1025) be accepted, notour bankruptcy must be held to exist.

In these circumstances I feel bound to state shortly the reasons which have compelled me to the change of opinion which I have admitted. They are shortly these, viz., that where the Debtors Act 1880, section 6, says, "In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted" by the coexistence of a new set of conditions, it would be to place on the expression "rendered" a strained, narrow, and even judaical interpretation, and one restrictive of the evident intention of the Act, if it was to be held that in order to satisfy the condition of the enactment the incompetency of the imprisonment must depend on the provisions of the Act and on them alone, and may not be referable to a double source, viz., the provisions of some other Act as well as the provisions of this Act. The Debtors Act 1880, section 4, provides, perfectly generally, that "with the exceptions hereinafter mentioned," which do not affect the present question, "no person shall after the commencement of this Act be apprehended or imprisoned on account of any civil debt." It therefore in its terms, *quoad* debts under £100 Scots, re-enacts the provisions of section 1 of the Imprisonment for Debt Act 1835. *Quoad* debts above £100 Scots, it extends to them the provisions of that Act, and therefore is both a piece of declaratory and a piece of original legislation. But I recognise now that the object of the Act was comprehensive, and that as it intended in section 4 to declare comprehensively the abolition of imprisonment for civil debt in all but the excepted cases, so it intended in section 6 to provide a new mode of creating notour bankruptcy in all cases covered by the comprehensive statement of section 4, irrespective of whether in such cases the incompetency of imprisonment depended solely on the provisions of the Act, or could also be referred to some other and prior law or enactment.

I am supported in this conclusion by the fact that the above Act of 1835 has since 1880 been repealed by the Statute Law

Revision Act 1891, so that now the abolition of imprisonment for debt in all cases depends in Scotland on the Debtors Act 1880 alone, thus indicating that the Act of 1880 had superseded that of 1835, the greater including the less.

LORD SALVESEN—This case raises the important question whether notour bankruptcy is constituted against a debtor by an expired charge following on a small-debt decree for a sum under £8, 6s. 8d. This question has never been made the subject of express decision, but there are conflicting judicial dicta which render it desirable that it should be settled once and for all.

By the Act 5 and 6 Will. IV, cap. 70, sec. 1, it was enacted that it should not be lawful "to imprison any person or persons on account of any civil debt which shall not exceed the sum of £8, 6s. 8d., exclusive of interest and expenses." This Act was still in force at the date of the passing of the Bankruptcy Act of 1856, and indeed until it was repealed by the Statute Law Revision Act 1891. Accordingly it is common ground that to render a debtor notour bankrupt under the provisions of the Bankruptcy Act in respect of a debt less than £8, 6s. 8d. it was necessary to follow up the expired charge by an execution of arrestment of the debtor's effects, or by execution of poinding of any of his moveables, or by a decree of adjudication of any part of his heritable estate for payment or in security. All these methods of constituting notour bankruptcy involved notice to the debtor in addition to the notice contained in the charge for payment and gave him additional time for meeting the debt. In the case of an execution of arrestment it was expressly provided that it should not have the effect of constituting notour bankruptcy unless it remained undischarged at the expiry of fifteen days from its date. In the case of debts of larger amount, where imprisonment remained competent, insolvency was constituted by a duly executed charge for payment followed by imprisonment or its equivalents.

The Debtors Act 1880 abolished imprisonment for debt except in case of taxes, fines, and penalties, and sums decerned for aliment. It accordingly became necessary to enact a new mode of constituting notour bankruptcy, and this was provided for by section 6. The words upon which the whole question in this case turns are these —"In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment." It is not necessary for the purposes of this case to quote the remaining part of the section, but there is an important proviso in these terms—"Nothing in this section contained shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79)."

The meaning of this proviso came up for decision in the case of *Black* v. *Watson*, 9 R. 167, where it was held by the First Division that it did not affect the substantive provision contained in the same section. In that case the debt which the respondent had been charged to pay was of such an amount that it would have been competent prior to the Act of 1880 to have imprisoned the debtor. In the course of his opinion, however, Lord President Inglis took occasion to construe section 6 of the Debtors Act. He said—"Now it must be observed that the cases in which the charge required to be followed by arrestment, poinding, or adjudication are cases in which as the law then stood" (that is, in 1856) "imprisonment was incompetent or impossible. But the section of the Act of 1880 provides, not for cases in which previous to that Act imprisonment was incompetent or impossible, but to cases in which imprisonment was rendered incompetent by force of the provisions of that Act itself. Therefore the two sections do not deal with the same subject-matter. Cases in which imprisonment is incompetent or impossible, not by reason of the Act of 1880, but on other grounds, will still continue to be regulated by that part of the Act of 1856 which I have read. I apprehend that these provisions of the Act of 1856 remain in full force, and in such cases the expired charge must be followed by arrestment, poinding, or adjudication. But in cases under the Act of 1880 a new form of procedure for constituting notour bankruptcy is introduced." And again in a later part of his opinion he says—"The provision of that section" (that is, the 7th section of the Act of 1856), "which relates to cases in which imprisonment was incompetent or impossible, will still remain law. In such cases arrestment, poinding, or adjudication must still be resorted to." Lord Mure's opinion was to the same effect. He said—"The Act of 1880 has introduced a new mode of constituting notour bankruptcy, but I agree with your Lordship in thinking that the whole provisions of the Act of 1856 remain in force except in regard to those cases in which under the Act of 1880 imprisonment has been abolished."

The same view was taken by the Second Division in the case of *Hodge* (*Stewart's Trustee*) v. *J. T. Salvesen & Company* (2 F. 983). The precise point decided was that a company cannot be constituted notour bankrupt by an expired charge on a decree for a sum exceeding £8, 6s. 8d., but that such charge must be followed by arrestment, poinding, or adjudication. The ground of decision was that in the case of a firm imprisonment was incompetent because impossible, and that accordingly section 6 of the Debtors Act 1880 did not apply. In the course of his opinion Lord Trayner said—"It was maintained, however, by the first party that an expired charge (with insolvency) was of itself enough to constitute notour bankruptcy under the Debtors Act 1880. And it is so. But it is so only in cases where imprisonment was made incompetent by the provi-

sions of that Act, and has no application to cases where imprisonment was formerly incompetent, as was the case in reference to a firm."

It thus appears that both Divisions having occasion to consider the construction of section 6 of the Debtors Act, arrived at the same result. The exact question now brought up for decision was not the subject of either of the two cases in which the opinions I have quoted were delivered; but there can be no doubt as to the conclusion at which the six Judges concerned would have arrived upon it. The practice of the profession has been consistent to the same effect, there being no known case until quite recently in which the notour bankruptcy required for purposes of sequestration or in a creditor's petition for cessio has been evidenced solely by an expired charge for payment of a sum less than £8, 6s. 8d. In the case of *Harvie* v. *Smith* (1908 S.C. 474), however, opinions were expressed by the Judges of the First Division—as then constituted—which are, in my opinion, irreconcilable with those in *Black* v. *Watson* and *Stewart's Trustee* v. *Salvesen*. These opinions were not necessary for the decision of the case, because, as it happened, the expired charge which was produced as evidence of notour bankruptcy was for a sum of £40, 3s.; and the only point actually decided was that section 1 of the Small Debt Act 1835 had no application to a decree for expenses where the expenses had been awarded in an action in which the principal sum decerned for exceeded £8, 6s. 8d. The Lord President, however, in dealing with the construction of section 6 of the Debtors Act 1880 made the following observations—"The appellant says that the section . . . is not applicable, because this is not a case in which imprisonment by its provisions was rendered incompetent, inasmuch as imprisonment was already incompetent at the date of the Act. In other words, he seeks to put a gloss on the expression 'rendered incompetent' to the effect that it really means 'rendered for the first time incompetent.' I do not think the appellant has any right to put such a gloss on these words." Lord M'Laren and Lord Kinnear were of the same opinion. The case of *Stewart's Trustee* v. *Salvesen* was, however, not cited at the debate. This omission was rectified in the next case—*Paull* v. *Smith* (1910 S.C. p. 25), where it was held by the First Division—dissenting Lord Johnston—that the method of constituting notour bankruptcy provided by section 6 of the Debtors Act 1880 applied to the case of a married woman living with her husband and not carrying on any separate business, who could not have been imprisoned for debt under the common law. I was a party to that decision, but on the special ground that the section was not dealing with individual or personal privileges, and that it fell to be construed as having a general application to all cases of civil debt for which imprisonment became incompetent under the Debtors Act. In so expressing myself I had in view that a distinction might still be maintained between debts below £8, 6s. 8d. and debts exceeding that sum.

Having now carefully reconsidered that whole matter, I have come to prefer the construction of section 6 of the Debtors Act adopted in the cases of *Black* v. *Watson* and *Stewart's Trustee* v. *Salvesen*. The whole question turns upon what meaning is to be given to the words "rendered incompetent under the provisions of this Act." I do not think it is putting a gloss upon these words to say that they mean "rendered for the first time" incompetent, although I prefer the language of Lord President Inglis, "by force of the provisions of this Act." If the Legislature had intended to put all debts on the same footing with regard to the constitution of notour bankruptcy, I think the enactment would have been otherwise expressed. It is said that the words that create the difficulty may be explained because of the cases referred to in the Act in which imprisonment for a civil debt is still competent; but I do not think the explanation is sufficient. If that had been the meaning it would have been easy to say "in the case of any debt in which imprisonment is incompetent, notour bankruptcy," &c.; and it was quite unnecessary to use the words "under the provisions of this Act" or "rendered." The Lord President's reasoning fails in my opinion to give effect to these words. Even if I had thought the enactment equally open to either construction, I should have preferred the older construction because of the long course of consistent practice which has followed upon it, and which so far as I know has given rise to no inconvenience. I think, besides, there is a special reason why notour bankruptcy should not be constituted by an expired charge on some trivial debt which the debtor might readily have overlooked, and the decree for payment of which might never have come to his knowledge. The service of a small-debt summons and also of a charge upon a decree granted in the Small Debt Court may be lawfully made at the residence of the debtor although it is shut up at the time, and the debtor may return to find that he has been made notour bankrupt for some trifling debt, when he had no knowledge of any proceedings having been taken against him. It is true this may still occur in the case of debts exceeding £8, 6s. 8d. and below £20; but at all events one is there in the region of substantial amounts. I need scarcely point out that the constitution of notour bankruptcy may entail serious consequences, for it may be founded on by a creditor of the required amount in a petition for sequestration, whatever be the amount of the original debt in respect of which the debtor was made notour. It is true that sequestration will not be granted if the debt be immediately paid and there be no other evidence of insolvency; but in the meantime great injury to credit will have occurred from the publication of the application for sequestration in the *Gazette*. I think therefore

it is undesirable to make the constitution of notour bankruptcy any easier than it has hitherto been according to the universal understanding of the profession, and indeed according to the understanding of the present pursuer, who was not content with his expired charge but followed it up by poinding before he presented his petition for cessio. I am therefore of opinion that the Sheriff-Substitute's judgment should be recalled, and that the case should be remitted back to him to allow a proof of the averments with regard to the effects attached by the poinding.

LORD MACKENZIE — I agree with the reasoning of the Lord President in the cases of *Harvie* v. *Smith*, 1908 S.C. 474, and *Paull* v. *Smith*, 1910 S.C. 1025, and with the opinion which Lord Kinnear has just delivered.

LORD JUSTICE-CLERK — I concur in the opinion of Lord Salvesen, which I have had an opportunity of perusing.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for Pursuer and Respondent—Wilton—Valentine. Agent—Robert Wood, S.S.C.

Counsel for Defender and Appellant—Blackburn, K.C.—A. M. Stuart. Agent—Alexander Sutherland, S.S.C.

Wednesday, March 8.

FIRST DIVISION.

[Sheriff Court at Jedburgh.

WALKER *v.* MURRAYS.

Master and Servant—Compensation—Refusal to State a Case—Note for Order to State Case—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 17 (*b*)—*Act of Sederunt June* 26, 1907, *sec.* 17 (*h*).

The Act of Sederunt of 26th June 1907 provides—section 17 (*h*)—"When a Sheriff has refused to state and sign a case, the applicant for the case may within seven days from the date of such refusal apply by a written note to one of the Divisions of the Court of Session for an order upon the other party or parties to show cause why a case should not be stated. Such note . . . shall be accompanied by the abovementioned certificate of refusal, and shall state shortly the nature of the cause, the facts, and the question or questions of law which the applicant desires to raise. . . ."

Where a Sheriff has refused to state a case for appeal under the Workmen's Compensation Act 1906, the claimant, in order to succeed in an application for an order to state a case, must state the findings to which he says he is entitled, and these must be such as to disclose an accident arising out of and in the course of the employment.

Ellen Storey Walker, housekeeper, Mervinslaw, Jedburgh, for her own interest, and also as custodian of her illegitimate pupil child, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from Thomas Murray and William Murray, farmers, Mervinslaw, Jedburgh.

The Sheriff-Substitute (BAILLIE) of Roxburghshire, acting as arbitrator under the Act, having refused to state and sign a case for appeal, the claimant presented a note to the First Division of the Court of Session. The Note stated—"In this arbitration, which was decided by Sheriff-Substitute Baillie on 28th December 1910, the said Sheriff-Substitute has refused, conform to certificate herewith produced, to state and sign a case, for which the appellant duly applied in writing.

"The question raised in the application to state and sign said case was whether on the facts proved the pursuer's father sustained personal injury by accident arising out of and in the course of his employment with the defenders (which injury resulted in his death) and thereby entitling the pursuer to compensation from the defenders under the Workmen's Compensation Act 1906.

"The deceased, who had previously suffered from rupture, became actually ruptured on 27th April 1910 while in the employment of the defenders. The rupture became strangulated and the deceased underwent an operation therefor, but died on the morning of Saturday, 30th April 1910. The pursuer raised an action in the Sheriff Court of Roxburghshire at Jedburgh, in which she claimed compensation under the Workmen's Compensation Act 1906 in respect that the said accident arose out of and in the course of deceased's employment

"The Sheriff-Substitute having considered the proof and whole process in said action, and heard parties' procurators in debate, found in fact and in law as follows, *videlicet*, that the deceased James Walker had for many years been suffering from ruptures which in January 1909 necessitated an operation, and that in January 1910 one of the ruptures reappeared; that on several occasions thereafter this rupture came down after slight natural exertion and without any exceptional causes or violent exertion; that on 27th April 1910 James Walker went to Ashtrees to fetch home a sow; that the whole distance there and back was about five miles, of which the last mile and a half was the smoothest part of the road with a bridle track or cart road along it; that during said mile and a half the rupture came down, that strangulation thereafter set in, and that James Walker died from shock following on an operation therefor on 30th April 1910, and that Walker made no statement of having met with any accident on his way home, and further that it was not proved that James Walker met with an accident